

STATE OF MICHIGAN
COURT OF APPEALS

STEFFAN GAYDOS,

Plaintiff-Appellee,

v

CITY OF ALLEN PARK,

Defendant-Appellant,

and

CITY OF ALLEN PARK PENSION BOARD,

Defendant.

UNPUBLISHED

September 16, 2014

No. 312725

Wayne Circuit Court

LC No. 10-013834-CK

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

In this employment dispute, defendant, City of Allen Park appeals by leave granted, see *Gaydos v City of Allen Park*, 495 Mich 923; 843 NW2d 177 (2014), the trial court's order denying its motion for summary disposition. Plaintiff, Steffan Gaydos, alleged several claims against the City, but the only issue remaining on appeal relates to Gaydos' age discrimination claim. Because we conclude the trial court did not err when it denied the City's motion for summary disposition as to that claim, we affirm that portion of the trial court's order.

The City argues that the trial court erred in denying its motion for summary disposition because there was no evidence that the City engaged in age discrimination contrary to the Elliott-Larsen Civil Rights Act. See MCL 37.2101 *et seq.* This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Hill v Sears, Roebuck and Co*, 492 Mich 651, 659; 822 NW2d 190 (2012).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court reviews the motion by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Douglas v Allstate Ins Co*, 492 Mich 241, 256; 821 NW2d 472 (2012). This Court "considers only the evidence that

was properly presented to the trial court in deciding the motion.” *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503, 506; 802 NW2d 712 (2010). Summary disposition is appropriate if there “is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” MCR 2.116(C)(10). “There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.” *Lakeview Commons*, 290 Mich App at 506 (quotation marks and citation omitted).

Under the Civil Rights Act, an employer shall not “[f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.” MCL 37.2202(1)(a). An age discrimination claim may be premised on: (1) disparate treatment, which requires a showing of either a pattern of intentional discrimination against protected employees or against the plaintiff; or (2) disparate impact, which requires a showing that an otherwise facially neutral employment policy has a discriminatory effect on members of a protected class. *Meagher v Wayne State Univ*, 222 Mich App 700, 708-709; 565 NW2d 401 (1997); *Farmington Ed Ass’n v Farmington School Dist*, 133 Mich App 566, 571; 351 NW2d 242 (1984).

Here, Gaydos alleged a claim of disparate treatment premised on age. To establish his claim of age discrimination, Gaydos had to show that he was—in relevant part—discriminated against with respect to employment, compensation, or a term, condition, or privilege of employment, and that the discrimination was on the basis of his age. See *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177; 579 NW2d 906 (1998). Gaydos could establish his claim through direct or circumstantial evidence of intentional discrimination. *Bachman v Swan Harbour Assoc*, 252 Mich App 400, 432; 653 NW2d 415 (2002). Direct evidence of discrimination is “evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.” *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133; 666 NW2d 186 (2003) (quotation marks and citation omitted).

Gaydos offered direct evidence of discrimination in response to the City’s motion. The contract between the City and Gaydos provided: “If for any reason there is a mutual separation between the parties prior to the expiration of this contract, the Deputy Police Chief would be allowed to retire and collect his pension, regardless of age and without penalty.” Mayor Tony Lalli testified that, even though the contract indicated that Gaydos could collect his pension benefits regardless of age, provided the separation was mutual, Gaydos was denied a pension because he was “too young.” Gaydos also gave examples of at least two older employees, the former police chief and the former fire chief, who had similar contract language and were allowed to retire and collect their pension benefits. On the other hand, Gaydos, the only employee under 40 years old with that contract language, was not permitted to do so. The City contends that the protected class of employees was persons under the age of 52, the age when Gaydos could have begun receiving retirement benefits. However, this characterization is irrelevant because the contract language promised a pension regardless of age, provided the separation was mutual. Therefore, viewing the record in the light most favorable to Gaydos, the trial court properly denied the City’s motion for summary disposition because there was direct evidence that the City refused to comply with its contract on the basis of Gaydos’ age. *Lakeview*

Commons, 290 Mich App at 506. Accordingly, we affirm the trial court's order with respect to that claim.

We note that the City's argument in its brief on appeal that there was no mutual separation is not properly before this Court. The trial court granted the City's motion for summary disposition of Gaydos' breach of contract claim. And this Court issued an order of peremptory reversal of the portion of the trial court's order dismissing Gaydos' breach of contract claim.¹ We similarly conclude that Gaydos' argument that this Court should deny the City's application for leave to appeal the trial court's order is without merit. Our Supreme Court remanded the case to this Court "for consideration, as on leave granted, of the plaintiff's age discrimination claim." *Gaydos*, 495 Mich at 923. Therefore, this Court is bound to review the trial court's order.

Affirmed in relevant part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly

¹ *Gaydos v City of Allen Park*, unpublished order of the Court of Appeals, entered May 16, 2013 (Docket No. 312275).